UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of MAXFIELD AND OBERTON HOLDINGS, LLC and CRAIG ZUCKER, individually, and as an officer of MAXFIELD AND OBERTON HOLDINGS, LLC Respondents.	)	CPSC DOCKET NO. 12-1 DEAN C. METRY Administrative Law Judge

CONSENT AGREEMENT
IN CAMERA

This Consent Agreement (Consent Agreement) is made to settle the above-captioned administrative action. The parties agree as follows:

Parties

1. The Commission staff is the staff of the United States Consumer Product Safety Commission (CPSC or the Commission), an independent regulatory agency of the United States, established by Congress pursuant to Section 4 of the Consumer Product Safety Act (CPSA), 15 U.S.C. § 2053.

2. Maxfield and Oberton Holdings, LLC (Maxfield and Oberton) is a Delaware limited liability company with its former principal place of business located at 180 Varick Street, Suite 212, New York, NY 10014. Maxfield and Oberton LLC filed a Certificate of Dissolution on December 27, 2012.

3. Craig Zucker (Respondent) is an individual and former Chief Executive Officer and co-managing member of Maxfield and Oberton.

4. Julie Beth Teicher, in her capacity as the Trustee of the MOH Liquidating Trust (Liquidating Trustee) is a non-party executing this Consent Agreement on behalf of the MOH Liquidating Trust (Liquidating Trust). The Liquidating Trust was established in Delaware on December 21, 2012, by Maxfield and Oberton Holdings, LLC and authorizes the Liquidating Trustee to perform acts reasonably necessary, appropriate or desirable to effectuate the purposes of the Liquidating Trust, including the settlement of claims of existing and future creditors against the Liquidating Trust. The Liquidating Trustee executes this Consent Agreement for the sole purpose of settling the claim made by the Commission against the Liquidating Trust and makes no admissions thereby.

Subject Matter

5. The Subject Products are small, individual magnets with a flux index greater than 50 sold under the brand name Buckyballs® and Buckycubes®. From March 2009 to December 27, 2012, Maxfield and Oberton was a manufacturer and importer, as those terms are defined in Sections 3(a)(5), (7), (11) and (13) of the CPSA, of approximately 2.5 million sets of Buckyballs® and Buckycubes® (collectively, the Subject Products). The Subject Products were offered for sale to consumers for their personal use in or around a permanent or temporary household or residence, in recreation or otherwise.

6. On July 25, 2012, the Commission staff filed an Administrative Complaint against Maxfield and Oberton seeking, *inter alia*, a recall of the Subject Products pursuant to Section 15 of the CPSA, as amended, 15 U.S.C. § 2064. On February 11, 2013, the Commission staff filed a Motion for Leave to File a Second Amended Complaint (Complaint) against Maxfield and

Oberton Holdings, LLC, and Respondent Zucker, individually and as an officer of Maxfield and Oberton seeking, *inter alia*, a recall of the Subject Products pursuant to Section 15 of the CPSA, as amended, 15 U.S.C. § 2064. The Complaint alleges that the Subject Products present a "substantial product hazard" within the meaning of Section 15(a) of the CPSA, 15 U.S.C. § 2064(a). The Complaint alleges that the Subject Products are defective under 15 U.S.C. § 2064(a)(2) because their instructions, packaging and warnings are inadequate, and because a substantial risk of injury arises as a result of the Subject Product's operation and use and the failure of the Subject Products to operate as intended. The Complaint further alleges that the Subject Products are defective under 15 U.S.C. § 2064(a)(1) because the Subject Products are toys that contain a loose as received hazardous magnet with a flux index greater than 50 in violation of ASTM 963-08 section 3.1.72 and its most recent version, ASTM 963-11 section 3.1.81 (the Toy Standard). On May 3, 2013, the Court entered an Order granting Complaint Counsel's Motion for Leave to File the Second Amended Complaint.

7. The Complaint alleges that from 2009 to the present, the Commission staff has received numerous incident reports involving the Subject Products, including several that required surgery.

8. Respondents filed separate Answers to the Complaint in which they denied that the Subject Products present a substantial product hazard or contain a defect within the meaning of Section15(a) of the CPSA, 15 U.S.C. § 2064(a) or Section 15(a)(l) of the CPSA, 15 U.S.C. § 2064(a). Respondent Zucker's Answer further denied that the Subject products are a toy, an object designed, manufactured, and/or marketed as a plaything for children under 14 years of age, are subject to, or violate, the Toy Standard, and denied that he controlled the acts, practices, and policies of Maxfield and Oberton.

Agreement

9. It is the express purpose of the parties in entering into this Consent Agreement to protect the public safety by implementing a voluntary corrective action involving the Subject Products.

10. The parties intend for this Consent Agreement, the Establishment of Recall Trust Document (Attachment A), and the attached Order (the Order), which are hereby incorporated by reference, to resolve staff's charges and requests for relief against Respondent set forth in the Complaint in this proceeding, and to resolve the Complaint and this proceeding without an adjudication by the Presiding Officer.

11. For purposes of settlement only, Respondent admits that the Commission has jurisdiction over the Subject Products as "consumer products" under Section 3 of the CPSA, 15 U.S.C. § 2064(a), and over Respondent.

12. Within 60 days of signing this Consent Agreement, the Commission staff shall establish the Recall Trust described in Attachment A. The Recall Trust will set forth a voluntary Corrective Action Plan agreed to by the Parties regarding the Subject Products (the CAP).

13. The Recall Trust shall execute the terms of the CAP.

14. Respondent will have no rights or interest in, or authority over, the Recall Trust and will have no ability to control or alter its terms or the administration thereof, but will receive a copy of reports of recall completion and the accounting of funds prepared by the Recall Trust pursuant to paragraph 9 of Attachment A.

15. The CAP, as set forth in Attachment A, shall include the following elements:

a. The Commission shall issue a press release announcing a voluntary recall of the Subject Products. The content of the press release shall be determined by Commission staff and shall comport with the terms of this Agreement and any prior press releases regarding the Subject Products or public information regarding magnet safety.

b. Subject to advance written approval by Commission staff and in accordance with the provisions of paragraph 15(a) of this Agreement, the Recall Trust shall publicize the recall to consumers and retailers.

c. The Recall Trust shall provide refunds to consumers pursuant to the provisions of Attachment A. The Recall Trust shall not pay or transfer any funds to Respondents.

d. The Recall Trust shall fund a Commission-accepted website to publicize and implement the recall. The website shall be operational for five years following the date of this Consent Agreement. All content of the website and payments concerning the website shall be approved by Commission staff and shall comport with the provisions of paragraph 15(a) of this Agreement and Sections 15(c) and (d) of the CPSA. All payments necessary to maintain the website for a period of five years shall be paid by the Recall Trust within six months of the establishment of the Recall Trust.

16. An escrow account shall be created and maintained at a financial institution by Respondent Zucker within five business days of the signing of this Agreement by Complaint Counsel, Respondent and the Liquidating Trustee, and shall be in settlement of the allegations in the Complaint for the purpose of funding the Recall Trust (Escrow Account). Funds deposited into the Escrow Account may only be withdrawn or transferred out of the Escrow Account under the conditions specified in subparagraphs (c) and (d) of this section. No Commission funds shall be used to fund the Escrow Account.

a. No later than five business days after signing this Consent Agreement, Respondent shall deposit $375,000 into the Escrow Account. Such payment is not a fine or penalty, but is an ordinary and necessary business expense.

b. Upon the signing of this Agreement by Complaint Counsel, Respondent and the Liquidating Trustee, Commission staff and Respondent shall transmit this Consent Agreement to the Presiding Officer pursuant to 16 C.F.R. § 1025.26, with a request that the Presiding Officer transmit it to the Commission.

c. If the Commission accepts this Consent Agreement pursuant to 16 C.F.R.§ 1025.26(f), $100,000 (the Initial Transfer Amount) of funds held in the Escrow Account shall be transferred irrevocably to the Recall Trust within five days of the establishment of the Recall Trust.

1. The Recall Trust shall allocate $75,000 of the Initial Transfer Amount to publicize the recall to consumers and retailers and undertake a notice campaign pursuant to CPSA Sections 15(c) and (d).

2. The Recall Trust shall allocate the remaining $25,000 of the Initial Transfer Amount to issue refunds to consumers and pay administrative costs and costs incurred by the trustee administering the Recall Trust (Recall Funds) as specified in Attachment A. If at any time the balance of funds in the Recall Trust's Recall Funds falls below $25,000, the parties agree that an additional $25,000 immediately and irrevocably shall be transferred from the Escrow Account to the Recall Trust's Recall Funds. Such fund transfers shall continue as needed until the funds in the Escrow Account are fully depleted, less any interest earned by the Escrow Account, which shall remain in the Escrow Account.

3. Twelve months after the establishment of the Recall Trust, any funds remaining in the Escrow Account shall be returned to Respondent and the Escrow

Account shall be closed. No additional funds shall be transferred from the Escrow Account to the Recall Trust, but funds in the Recall Trust's Recall Funds shall remain in the Recall Trust and may be used by the Recall Trust to publicize the recall to consumers and retailers.

d. If the Commission rejects this Consent Agreement pursuant to 16 C.F.R. § 1025.26(g), all funds held in the Escrow Account shall be returned immediately to Respondent.

17. Upon Commission acceptance of this Consent Agreement and issuance of the Order pursuant to 16 C.F.R. § 1025.26(f), (i) all pending claims of the Commission against the Liquidating Trust are deemed withdrawn without further action; and (ii) the Liquidating Trust waives any claims under the Equal Access to Justice Act (5 U.S.C. §504) and it shall bear its own costs and expenses, including, without limitation, attorneys' fees incurred in connection with this proceeding, CPSC Docket No. 12-1, the Consent Agreement and the transactions contemplated hereby.

18. If the Commission accepts this Consent Agreement pursuant to 16 C.F.R. § 1025.26(f), then this proceeding, CPSC Docket No. 12-1, shall be dismissed with prejudice.

19. If the Commission rejects this Consent Agreement pursuant to 16 C.F.R. § 1025.26(g), then this Consent Agreement shall be null and void.

20. The Recall Trust shall fulfill all requirements of the Agreement and Order.

21. Pursuant to 16 C.F.R. §1115.20(b)(1)(v), Respondent acknowledges that the Commission reserves the right to seek sanctions against Maxfield and Oberton for any violation of the reporting obligations of Section 15(b) of the CPSA and its right to take appropriate legal action. Respondent further acknowledges that pursuant to 16 C.F.R. § 1115.20(b)(1)(x), any interested person may bring an action pursuant to section 24 of the CPSA in any U.S. District Court in the district for which the Consenting Party is found or transacts business to enforce the order and to obtain appropriate injunctive relief.

22. In consideration of the actions set forth in this Consent Agreement in settlement of the allegations in the Complaint, including actions taken pursuant to paragraph 26 herein, the Commission fully releases, acquits and forever discharges Respondent Zucker, in his individual capacity and in any capacity as a member, manager, officer or employee of Maxfield and Oberton Holdings, LLC, from all claims, demands, liabilities, actions, or causes of action in connection with any violations of any of the acts or regulations enforced by the Commission arising out of or in any way concerning the manufacturing, importation, distribution, and sale of the Subject Products occurring prior to the date of this Consent Agreement.

23. Upon acceptance of the Agreement and issuance of the Order by the Commission, the Commission and Respondent may disclose the terms of this Consent Agreement and Order to the public.

24. This Consent Agreement shall take effect upon final acceptance by the Commission and issuance of the Order.

25. Upon acceptance by the Commission of this Consent Agreement and entry of the Order, Respondent knowingly, voluntarily, and completely waives and relinquishes any past, present, and future right or rights in this matter or any other matter related to the Subject Products: (1) to an administrative or judicial hearing and to all further procedural steps, including findings of fact, conclusions of law, or further determination of whether the Subject Products contain a defect which creates a substantial product hazard within the meaning of Section 15 of the CPSA; (2) to seek judicial review or otherwise contest the validity of this Consent Agreement or Order as issued and entered; (3) to seek judicial review of this or any past order, finding or determination of the Commission or the Presiding Officer in this matter or any other matter related to the Subject Products; and (4) to seek administrative or judicial review of

any action by the Commission, Commissioners, and Commission staff relating to the Subject Products.

26. Within five business days of the acceptance of the Agreement and issuance of an Order by the Commission, Respondent Zucker agrees to voluntarily dismiss with prejudice all pending actions against the Commission arising out of or in any way concerning the manufacturing, importation, distribution, and sale of the Subject Products, including but not limited to the following actions and petitions: *Craig Zucker v. U.S. Consumer Product Safety Commission, and Robert Adler, in his official capacity as Acting Chairman of the U.S. Consumer Product Safety Commission,* Civil No. 8:13-cv-03355-DKC. (D. Md.); and *Petition for Disclosure and Correction in Connection with the Information Quality Act filed with the Office of the Secretary of the Commission on November 12, 2013, and related appeal dated April 14, 2014*; and voluntarily withdraw all pending petitions or other requests filed with the Commission arising out of or in any way concerning the manufacturing, importation, distribution, and sale of the Subject Products.

27. It shall be unlawful to sell, offer for sale, manufacture for sale, distribute in commerce, or import into the United States the Subject Products pursuant to Section 19(a)(2) of the Consumer Product Safety Act, 15 U.S.C. § 2068(a)(2).

28. For all purposes, this Consent Agreement and Order shall constitute an enforceable judgment obtained in an action or proceeding by a governmental unit to enforce its police or regulatory power. Respondent acknowledges and agrees that this Consent Agreement and Order are pursuant to the Commission's police power or regulatory power to remedy the risk created by and protect the public from and risk of injury to children, and that this Consent Agreement and Order are not subject to an automatic stay if Respondent becomes the subject of

a bankruptcy proceeding. All payments made pursuant to Paragraph 16 are non-dischargeable under the Bankruptcy Code. If any claim in a bankruptcy proceeding is made upon Respondent within 91 days of the establishment of the Recall Trust for the repayment or return of the payment made pursuant to this Agreement, and any repayment or returns of all or substantially all of said money or property is made by reason of (a) any judgment, decree or order of any bankruptcy court having jurisdiction over Respondent or (b) any settlement or compromise of any such bankruptcy claim between the Respondent and such claimant, then in such event the provisions of this Agreement and the Order shall be automatically null and void and the parties shall be returned to their pre-Consent Agreement positions.

29. The signing of this Consent Agreement by Respondent Zucker does not constitute an admission by Respondent of the existence of a defect in the Subject Products, a substantial product hazard or reportable information pursuant to Section 15(b) of the CPSA, 15 U.S.C. § 2064(b), that the Subject Products are a toy, a children's product, or are subject to, or violate, the Toy Standard, or that the Commission has jurisdiction over Respondent Zucker except for purposes of this Consent Agreement. Respondent Zucker is entering into this Consent Agreement in settlement of the allegations of the Complaint against him as a responsible corporate officer of Maxfield and Oberton, and not in settlement of any obligations of Maxfield and Oberton.

30. If, after the effective date hereof, any provision of this Consent Agreement and Order is held to be illegal, invalid, or unenforceable under present or future laws effective during the terms of this Consent Agreement and Order, such provision shall be fully severable. The rest of this Consent Agreement and Order shall remain in full effect, unless the

Commission determines that severing the provision materially impacts the voluntary Corrective Action Plan set forth in this Consent Agreement and Order.

31. The provisions of this Consent Agreement and Order shall not be interpreted or construed against any person or entity because that person or entity or any of its attorneys or representatives drafted or participated in drafting this Consent Agreement. No representations other than those contained in this Consent Agreement, the Establishment of Trust Document (Attachment A), and the attached Order, have been made or relied upon by either party in negotiating or executing this agreement.

32. The provisions of this Consent Agreement and Order shall be interpreted in a reasonable manner to effect its purpose to remedy the hazard that the Complaint alleges that the Subject Products pose. In the event of a dispute between the Parties arising under this Consent Agreement and Order, the Parties agree to submit the issue for initial determination by the Commission, without waiver of the jurisdiction of the United States District Courts to preside over the dispute thereafter.

33. The existence of a dispute shall not excuse, toll, or suspend any obligation or deadline established under this Consent Agreement or Order.

34. Respondent hereby waives any claims under the Equal Access to Justice Act (5 U.S.C. § 504), and Complaint Counsel and Respondent agree that they shall each bear their own costs and expenses, including, without limitation, attorneys' fees incurred in connection with this proceeding, CPSC Docket No. 12-1, the Consent Agreement and the transactions contemplated hereby.

35. This Consent Agreement and Order shall not be waived, changed, amended,

modified or otherwise altered, except in writing executed by the Party against which such amendment, modification, alteration or waiver is sought to be enforced, and approved by the Commission.

36. This Consent Agreement may be executed in any number of counterparts, each of which shall be an original and all of which shall constitute but one and the same agreement. Signature pages transmitted electronically (by facsimile or scanning and emailing) shall be considered to be an original.

DATED: APRIL 30, 2014

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Respondent

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UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of MAXFIELD AND OBERTON HOLDINGS, LLC and CRAIG ZUCKER, individually, and as an officer of MAXFIELD AND OBERTON HOLDINGS, LLC Respondents.	)	CPSC DOCKET NO. 12-1 DEAN C. METRY Administrative Law Judge

ORDER
IN CAMERA

UPON CONSIDERATION of the Complaint against Respondents issued on or about May 3, 2013, as amended (the Complaint), and the Consent Agreement appended hereto and all attachments;

UPON CONSIDERATION of Respondent Zucker's admission for purposes of this Agreement that the Commission has jurisdiction over him and the Subject Products, and that Buckyballs® and Buckycubes® constitute "consumer products" under the Consumer Product Safety Act (CPSA), 15 U.S.C. § 2052; and Pursuant to Sections 15(c) and (d) of the CPSA, 15 U.S.C. § 2064(c) and (d), IT IS HEREBY ORDERED THAT:

1. The Consent Agreement between Respondent Zucker and the Commission staff is accepted and incorporated by reference herein, and Respondent shall comply with all of his obligations hereunder.

2. All allegations of the Complaint against Respondents are resolved by this Consent Agreement, Order and Attachments. Based on the Consent Agreement, the Commission finds that the Consent Agreement and this Order are necessary to protect the public from the hazard that the Complaint has alleged are presented by Buckyballs® and Buckycubes® (the Subject Products).

3. To remedy the substantial product hazard and the substantial risk of injury to children as alleged in the Complaint, the Recall Trust shall implement a voluntary Corrective Action Plan, pursuant to, and in accordance with, the terms of the Consent Agreement incorporated by reference herein and the Establishment of Recall Trust attached to the Consent Agreement as Attachment A.

4. All actions undertaken by the Recall Trust to implement the Corrective Action Plan shall be approved in advance by Commission staff.

5. The above-captioned proceeding is dismissed with prejudice.

6. Any sale, offer for sale, manufacture for sale, distribution in commerce or importation into the United States of the Subject Products shall be a prohibited act under Section 19(a)(2) of the CPSA, 15 U.S.C. § 2068(a)(2).

7. This Order is issued under Section 15 of the CPSA, 15 U.S.C. § 2064. Any violation of this Order is a prohibited act within the meaning of Section 19(a)(5) of the CPSA, 15 U.S.C. § 2068(a)(5), and may subject a violator to civil and/or criminal penalties under Sections 20 and 21 of the CPSA, 15 U.S.C. §§ 2069 and 2070.

8. Any violation of Paragraph 6 of this Order shall be considered a separate prohibited act within the meaning of Section 19(a)(2) of the CPSA, 15 U.S.C. § 2068(a)(2), and may subject a violator to civil and/or criminal penalties under Sections 20 and 21 of the CPSA, 15 U.S.C. §§ 2069 and 2070.

BY ORDER OF THE CONSUMER PRODUCT SAFETY COMMISSION

Todd Stevenson, Office of the Secretariat

DATED: May 5, 2014

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of MAXFIELD AND OBERTON HOLDINGS, LLC and CRAIG ZUCKER, individually, and as an officer of MAXFIELD AND OBERTON HOLDINGS, LLC Respondents.	)	CPSC DOCKET NO. 12-1 DEAN C. METRY Administrative Law Judge

ATTACHMENT A
IN CAMERA

ESTABLISHMENT OF RECALL TRUST

This trust (Recall Trust) is created by or at the direction of the Commission staff for purposes of implementing a Corrective Action Plan set forth in the attached Consent Agreement, through which the parties intend to settle the above captioned litigation.

Responsibilities of the Recall Trust

The Recall Trust shall implement a voluntary Corrective Action Plan regarding the Subject Products (the CAP), the terms of which shall be in accordance with the following:

1. The Recall Trust shall be administered by an individual approved by the Commission staff, who shall act at the direction of the Commission staff at all times. Respondent shall be advised of the individual administering the Recall Trust.

2. No later than five business days after the establishment of the Recall Trust, $100,000 of funds (the Initial Transfer Amount) in the Escrow Account established pursuant to the Consent Agreement shall be irrevocably transferred from the Escrow Account into

the Recall Trust. Those funds shall be used solely for purposes of carrying out the Corrective Action Plan agreed to by the parties, as set forth more fully herein. All expenditures and notices required by this paragraph shall be approved in advance by Commission staff.

3. The Recall Trust shall allocate $75,000 of the Initial Transfer Amount to publicize the recall to consumers and retailers consistent with Sections 15 (c) and (d) of the CPSA. The Recall Trust shall allocate the remaining $25,000 of the Initial Transfer Amount to issue refunds to consumers and pay administrative costs (Recall Funds).

4. Any time the balance of Recall Funds remaining in the Recall Trust falls below $25,000, the parties agree that an additional $25,000 immediately and irrevocably shall be transferred from the Escrow Account to the Recall Trust's Recall Funds. Such fund transfers shall continue as needed unless the funds in the Escrow Account are fully depleted, less any interest earned by the Escrow Account, which shall remain in the Escrow Account.

5. Twelve months after the establishment of the Recall Trust, any funds remaining in the Escrow Account shall be returned to Respondent and the Escrow Account shall be closed. No additional funds shall be transferred from the Escrow Account to the Recall Trust, but funds in the Recall Trust's Recall Funds shall remain in the Recall Trust and may be used by the Trust to publicize the recall.

6. a. The Recall Trust shall spend $75,000 of the Initial Transfer Amount to publicize the recall and provide notice as set forth in CPSA Section 15(c) and (d). The Recall Trust shall send the press release to retailers of the Subject Products, and shall send notification to consumers of the Corrective Action Plan described herein, including information on how consumers may obtain a refund.

b. The Recall Trust shall fund a Commission-accepted website to publicize and implement the recall. The website shall be operational for five years following the date of this Consent Agreement. All content of the website and payments concerning the website shall be approved by Commission staff. All payments necessary to maintain the website for a period of five years shall be paid by the Recall Trust within six months of the establishment of the Recall Trust.

c. Notwithstanding the Protective Order entered by the Presiding Officer in CPSC Docket 12-1 on January 8, 2014 (Protective Order), the Recall Trust shall be permitted to review confidential documents provided to Complaint Counsel in CPSC Docket 12-1 for the sole purpose of retrieving contact information for consumers who purchased Subject Products and retailers who sold the Subject Products and contacting such consumers and retailers to notify them about the recall. Any persons reviewing confidential documents as provided for in this paragraph shall sign the Acknowledgment and Agreement to Be Bound By Protective Order as provided for in the Protective Order, and shall not disclose the contents of any confidential documents except as provided for in this paragraph.

7. The Recall Trust shall spend Recall Funds as follows:

a. Within four weeks of the establishment of the Recall Trust, the Recall Trust shall fully establish a procedure for processing consumer claims which shall be communicated to Respondent. The procedure shall include a process designed to avoid fraud and ensure that only claims by eligible consumers are paid.

b. For six months after the publication of a press release announcing the establishment of the Recall Trust and voluntary corrective action, the Recall Trust shall

accept claims from United States consumers who purchased Buckyballs® or Buckycubes® imported and distributed by Maxfield and Oberton.

c. The Recall Trust shall require that all claims be in writing and accompanied by proof of purchase which shall consist of a receipt showing a purchase in the United States or an affidavit executed under 18 U.S.C. §1001, which acknowledges purchase of the Subject Products in the United States, the place of purchase and the purchase price. Consumers who provide proof of purchase and return the Subject Products to the Recall Trust at the address provided on the Recall Trust website shall receive a full refund of the purchase price in accordance with the schedule below (less a reasonable allowance for use if such product has been in the possession of a consumer for one year or more as of the time of the public notice issued pursuant to paragraph (b) above), plus a reasonable allowance for shipping by standard U.S. First Class Mail, as determined by the Recall Trust. The Recall Trust shall provide refunds to consumers as follows: Consumers who return at least 76 Buckyballs® or Buckycubes® from a set of 125 shall receive a full refund; consumers who return fewer than 76 but more than 50 Buckyballs® or Buckycubes® from a set of 125 shall receive fifty percent of the purchase price; consumers who return at least 152 Buckyballs® or Buckycubes® from a set of 216 shall receive a full refund; consumers who return fewer than 152 but more than 100 Buckyballs® or Buckycubes® from a set of 216 shall receive fifty percent of the purchase price. Consumers who return quantities lower than those listed above for the sets identified shall not be entitled to a refund.

d. The Recall Trust shall pay refunds to eligible consumers in accordance with paragraph 7(c) of this Agreement as claims are received, so long as funds are available in the Recall Trust.

8. No funds from the Recall Trust shall be returned to the Escrow Account or paid to any individual or entity not approved by Commission staff as appropriate and necessary to carry out the terms of the Corrective Action Plan.

9. The Recall Trust shall provide to the Commission quarterly progress reports and such other updates concerning the implementation of the corrective action as directed by Commission staff, along with an accounting of funds thirty days after the issuance of the press release announcing the establishment of the Recall Trust and voluntary recall and quarterly thereafter, copies of which shall be provided to Respondent.

10. The Recall Trust shall be accountable to the Commission for all actions taken by the Trust to fulfill the terms of the corrective action described herein and in the Consent Agreement and Order.

11. The Recall Trust shall fulfill all requirements necessary to effectuate the Corrective Action Plan agreed to by the parties.

12. This Establishment of Trust shall not be waived, changed, amended, modified or otherwise altered, except as approved by the Commission if necessary to fulfill the terms of the CAP.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

Regarding the Consent Agreement in the Matter of MAXFIELD AND OBERTON HOLDINGS, LLC and CRAIG ZUCKER, individually, and as an officer of MAXFIELD AND OBERTON HOLDINGS, LLC, Respondents

DISSENTING OPINION OF COMMISSIONER ROBERT ADLER

May 14, 2014

The Consumer Product Safety Commission has just approved, by a 2-1 vote, a proposed Consent Agreement between CPSC staff and the respondents in the above captioned matter. Although I commend the parties for their willingness to reach what appears to be a carefully negotiated agreement, and I acknowledge my colleagues' very reasonable desire to end the litigation, I find myself, upon careful review of the Agreement, strongly disagreeing with a number of its terms. I believe that in the long run consumers will be at greater risk from approving this Agreement with its current flaws than from continuing the litigation seeking more protection for consumers. Accordingly, I respectfully dissent.

Background

On July 25, 2012, as authorized by the Commission, CPSC staff filed an Administrative Complaint against Maxfield and Oberton seeking a recall of the magnet products sold by the company. Subsequently, staff filed an amended complaint seeking to add Craig Zucker, individually and as an officer of Maxfield and Oberton, after he dissolved Maxfield and Oberton Holdings, as an additional respondent.[1]

[1] I note that the Administrative Law Judge preliminarily granted CPSC staff's request to add Mr. Zucker individually as a respondent. Because the Consent Agreement supersedes the judge's ruling, the Commission will not rule on

The Product: High Power Magnets

The products sold by respondents are small, individual high-power[2] magnets marketed under the brand name of Buckyballs and Buckycubes. Staff alleged that the respondents sold approximately 2.5 million sets of the products during the period from March 2009 to December 27, 2012. Buckyballs and Buckycubes are sold in sets of up to 216 rare earth magnets.

The Alleged Hazard: Extremely Serious

As alleged by staff, the hazard arises when someone, often a young child, ingests two or more magnets. The magnets that attract through the walls of the intestines result in progressive tissue injury, beginning with local inflammation and ulceration, progressing to tissue death, then perforation or fistula formation. Such conditions can lead to infection, sepsis, and death.[3]

At the time of filing the administrative complaint, CPSC staff had learned of more than two dozen high-power magnet ingestion incidents, with at least one dozen involving Buckyballs. Surgery was required in many of the incidents.

These incidents occurred notwithstanding vigorous attempts by respondents to warn purchasers of this serious hazard in their packaging and advertising. Unfortunately, the warnings seem to have proven ineffective. When the magnets are removed from their packages for use, the warnings do not travel with the product nor are the warnings useful or effective with small children, one of the groups most at risk from this product. Moreover, a number of reports indicate that magnets, because they are small and loose, can get separated from the sets, thereby remaining available for toddlers to find and swallow.[4] In some of the reported incidents, young children accessed loose magnets left on a refrigerator and other parts of the home.

One other hazard allegedly manifested itself with the high-power magnets. Tweens and teenagers, on occasion, have used high power magnets to mimic piercings of the tongue, lip or

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this issue. My own view is that, in an appropriate case, the Commission has the authority to include individuals as respondents, but I have made no determination whether this is such a case.

[2] According to staff allegations, Buckyballs carry a flux index greater than 50.

[3] *See* Commission complaint at ¶ 17, available at: http://www.cpsc.gov//PageFiles/131696/maxfield1a.pdf.

[4] The fact that individual magnets can detach from the set seems confirmed in the terms of the recall, which permits refunds for returned magnet sets with up to 40% of the magnets missing. See note 6, and accompanying text. To be clear: I have no quarrel with this liberal refund policy. I simply note that it illustrates how likely it is that individual magnets can become separated.

cheek, resulting in incidents where they unintentionally inhaled and swallowed the magnets – again, with tragic results.

What makes these incidents so compelling, aside from the destructiveness of the ingestions, is the fact that the magnets, by themselves, look benign and the harm from ingesting them does not occur immediately or obviously. In fact, as alleged in the Commission's complaint, doctors examining patients with ingested magnets can find it difficult to give an immediate or accurate diagnosis because the symptoms mimic other less serious digestive disorders, which can lead to the erroneous belief that no treatment is necessary or a delay in a surgical intervention which can exacerbate life-threatening internal injuries.[5] In short, these magnets seem to pose a true hidden hazard.

All of these high-risk elements led staff to take the rare step of filing an administrative complaint against the respondents, signaling their strong concerns about the hazard.

The Consent Agreement: Less Than Meets the Eye

In order to understand my disagreement with the Consent Agreement, one needs to read it carefully. Not having been a party to the negotiations, I rely only on the specific words used by the participants – extremely talented and experienced attorneys on both sides of the negotiation – in crafting the Agreement. I take it that the parties meant what they said and said what they meant.

Briefly summarized, the Consent Agreement operates as follows:

1. Respondent Zucker is required to establish an Escrow Account and deposit $375,000 in it within five days of the signing of the Consent Agreement by CPSC staff and a Liquidating Trustee acting on Zucker's behalf.

2. Thereafter, CPSC staff are required to establish a Recall Trust to provide refunds to consumers pursuant to the provisions of the Consent Agreement. The Recall Trust, in turn, is required to fund a Commission-accepted website "to publicize and implement the recall." The website is to be operational for five years following the date of the Consent Agreement.

3. Of the $375,000 placed in the Escrow Account, $100,000 is to be transferred irrevocably to the Recall Trust. Of this initial amount, $75,000 is to be used to publicize the recall to consumers and retailers, and to undertake a notice campaign pursuant to Sections 15(c)

[5] *See* Commission complaint at ¶ 18 & 19, available at: http://www.cpsc.gov//PageFiles/131696/maxfield1a.pdf.

and (d) of the Consumer Product Safety Act.[6] The remaining $25,000 is to be used to issue refunds to consumers and to pay administrative and other costs incurred by the trustee administering the Recall Trust.[7]

4. If at any time, the balance of funds in the Recall Trust Fund falls below $25,000, the Escrow Account will immediately and irrevocably transfer an additional $25,000 to the Recall Trust Fund. Such fund transfers will continue as needed until the funds in the Escrow Account are fully depleted, less any interest earned by the Escrow Account, which shall remain in the Escrow Account.[8]

5. Consumers seeking a refund will be eligible for reimbursement for a period limited to six months after the publication of a press release by the Commission announcing the establishment of the Recall Trust Fund.

6. Twelve months after the establishment of the Recall Trust Fund, any funds remaining in the Escrow Account shall be returned to Respondent Zucker, and the Escrow Account shall be closed.

7. Depending on how many Buckyballs or Buckycubes they return, consumers may receive full reimbursement, partial reimbursement or no reimbursement.[9]

[6] In fact, this $75,000 seems to be the only money the Agreement requires be spent on publicizing the recall and notifying the public of the product's hazards.

[7] The agreement does not specify any formula for allocating funds between the trustee's expenses and consumer refunds. I hope the trustee's expenses will be monitored.

[8] I see no reason for the Escrow Account, which may be returned in part to respondent Zucker, to have greater rights to the interest than consumers seeking refunds.

[9] The formula is as follows:

Set Size	Refund Amount
Buckyball or Buckycube set of 216 magnets	
Return at least 152	Full refund
Return fewer than 152, but more than 100	Fifty percent refund
Return fewer than 100	No refund
Buckyball or Buckycube set of 125 magnets	
Return at least 76	Full refund
Return fewer than 76, but more than 50	Fifty percent refund
Return fewer than 50	No refund

I take issue with several aspects of this Agreement. I believe that it promises more than it delivers and establishes several bad precedents.

The Recall Agreement: A Five Year Deal Good For Only Six Months

The most disappointing aspect of the recall is the enormous disconnect between the life of the recall website and the period of refund eligibility. On the one hand, the Agreement calls for the website to exist for five years with the express mission "to publicize the recall and its implementation." On the other hand, there will be no meaningful recall or implementation for most of the website's five year life because the Recall Trust Fund for consumers will permit claims for only six months. I repeat: *notwithstanding the five year life of the recall website, consumers will have only six months to file claims for refunds*.

To say the least, this Agreement sends an extremely mixed signal to consumers. Anyone reading the terms of the recall during 90 percent of the life of the recall website will be extremely disappointed to discover that he or she is out of luck for obtaining a refund. Such an approach can only trigger resentment among members of the public – and serve to undermine the Commission's credibility as a strong voice for consumers.

The $375,000 Escrow Account: a Minuscule Amount Fleetingly Available

Anyone reading the terms of the $375,000 Escrow Account might recall the joke told by Woody Allen in his 1977 Oscar-winning film, *Annie Hall*, (which I paraphrase):

> Customer One: "The food here is terrible."
> Customer Two: "Yeah, I know – and such small portions."

Picking up on that theme, I find the $375,000 Escrow Account number not only minuscule, but available only for such a short time.

Given a population of 2.5 million Buckyball and Buckycube sets sold at retail for prices ranging from $25.00 to $35.00, one can see that if everyone sought a refund, the price tag for this recall would be in the tens of millions of dollars. The number of sets likely to be returned, however, seems likely to be less than 2.5 million. Precisely how many is a matter of conjecture at this point, but if the $375,000 figure is based on the parties' best estimate of how many sets will be returned, the only thing one can say is that they have made a truly gloomy prediction.

Of course, the $375,000 number may not reflect anyone's estimate of the likely return rate. It may instead represent the extent of respondent Zucker's financial reserves and reveal a state of poverty rather than anything else. Not being privy to the negotiations or respondent's balance sheet, I have no way of knowing how the figure was obtained. I simply note that it is minuscule compared to the potential liability of the fund.

Even assuming that few, if any, consumers respond to the refund offer during its all-too brief existence, that does not lessen the hazard to consumers – if anything, it heightens it. A low return rate, to me, argues even more for dedicating the funds to publicizing the hazard of Buckyballs and Buckycubes.[10]

Returning the Escrow Account Balance to Respondent Zucker: A Bad Precedent

Although the precise financial condition of respondent Zucker is unknown to me, I surmise one clear fact: he has at least $375,000 available to support a recall to protect consumers. Accordingly, I fail to see the benefit of potentially returning these funds to him given the competing need to protect consumers. I believe all of the funds should be dedicated in one way or another to protecting consumers from the effects of ingesting high-power magnets.

At a minimum, if one were inclined – and I am reluctant to do so – to return funds in the Escrow Account to respondent, it would seem more appropriate to require the funds to remain available for consumer refunds for the entire five year life of the recall website. At that point, one might conclude that the point of diminishing returns had arrived. But, making the funds vanish almost immediately serves no useful safety purpose.

The Perfect Versus the Good

I am a firm supporter of the principle of not letting the perfect defeat the good. I consider myself a pragmatist, and I eagerly embrace the concept of compromise. So, one might ask, even if I think this Consent Agreement to be less than optimal, why did I vote to reject it? My answer is that this Agreement is a thoroughly unacceptable deal that is likely to be cited time and again in the future by respondents seeking to minimize and undermine CPSC staff requests for effective Corrective Action Plans.

I do not relish the thought of continuing this litigation and would have preferred to send the Agreement back to the parties to see whether respondents would have been willing to show more flexibility on its terms. Unfortunately, given the stark choice between accepting or rejecting the Agreement, I have no alternative but to reject it. I repeat my view: in the long run, consumers will be at greater risk from our approving this flawed Agreement than from continuing the litigation seeking more protection for consumers.

Again, despite my belief that $375,000 is an inadequate amount of money offered for too short a time, I have no facts before me that would lead me to conclude that staff could have secured an amount greater than this from respondent Zucker. However, once it became clear that the

[10] I note also that the only mechanism in the Agreement for publicizing the recall and notifying the public about the product hazard is the recall website. Given other forms of publicity like social media, this seems an unduly limited approach.

respondent had this amount available for a recall, I believe that it should have been dedicated to the recall and to protecting consumers, not returned to him after being doled out in tiny chunks to the Recall Trust. In fact, I would have been willing to agree – albeit reluctantly – to return the funds to him after the recall website is taken down in five years, but even that alternative falls outside the terms of the Agreement.

Conclusion

I would reject this Consent Agreement and send it back to the parties with instructions to build in more protections for at-risk consumers, especially children, from this extremely serious hazard.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

COMMISSIONER MARIETTA S. ROBINSON

May 14, 2014

STATEMENT OF COMMISSIONER MARIETTA S. ROBINSON ON THE ORDER IN MAXFIELD AND OBERTON HOLDINGS, LLC AND CRAIG ZUCKER, INDIVIDUALLY AND AS AN OFFICER OF MAXFIELD AND OBERTON HOLDINGS, LLC

On May 9, 2014, I voted to approve the settlement In the matter of Maxfield and Oberton Holdings, LLC and Craig Zucker, as an individual and as an officer of Maxfield and Oberton Holdings, LLC. I am delighted that the parties came to a resolution that does exactly what was sought both before the Complaint was filed and throughout this litigation: a recall and cessation all importation and distribution of Buckyballs (a "stop sale") of high-powered magnet sets, called Buckyballs and Buckycubes (collectively "Buckyballs"), a product responsible for thousands of injuries and deaths in infants, small children and teenagers.

I became a Commissioner of the U.S. Consumer Product Safety Commission ("CPSC" or "Commission") in July 2013 when this lawsuit was already ongoing. Given the peculiar position of a Commissioner in matters such as these where I could become one of the final decision makers in the case, the information I was able to obtain pre-settlement was limited to pre-lawsuit information and what was in the public record.

I learned that CPSC staff estimated there were 1716 injuries from this product between 2009 and 2011 based on emergency room data throughout the country. During a hearing held on October 22, 2013, to consider a possible rulemaking on high-powered magnets, five pediatric gastroenterologists testified that they had done a survey of the members of their professional organization and, even with only approximately 25 percent of their members responding, they identified 480 ingestions in ten years with 204 in the 12 months prior to their October 2012 report. The physicians showed that every single state had had at least one person who was injured by these magnets. These numbers are certainly just the tip of the iceberg. Further, these physicians testified that the injuries from these magnets are insidious, horrific and life-altering often requiring removal of portions of the child's intestines and lifetime care.

The CPSC exists to address just such dangerous products. This lawsuit never asked for anything but a recall and stop sale of, and publicity regarding, this potentially dangerous

product. Despite his many hyperbolic assertions to the contrary, this lawsuit has never been about punishing Mr. Zucker.

Prior to becoming a Commissioner, I was a litigator for more than thirty years and participated in many settlement negotiations. I found that when I started settlement discussions, after years of arguing with the other side, it was very important to go back to how I had evaluated the case before discovery began and ask what I would have settled the case for on the day of filing the Complaint.

In this case, I was presented with the recommended settlement by our General Counsel, but without any of the information a client would receive in the private sector, such as the starting positions of the parties, the process of reaching the proposed settlement, the issues raised by the other side and the opposing counsel's views of strengths and weaknesses on both sides. None of this information is available to a Commissioner in making her decision.
So, I went to the Complaint and compared it to the proposed settlement as I would have done in the private sector. The Commission's Complaint requested that the Defendants (1) effectuate a recall of Buckyballs, (2) cease all importation and distribution of Buckyballs, (3) publicize the ability for consumers to receive a refund for the recalled Buckyballs, and (4) publicize the dangers of Buckyballs by posting information regarding incidents and injuries associated with ingestion or aspiration of Buckyballs.

This settlement accomplishes exactly what the Commission set out to do. In short:

- The Commission has issued a press release announcing a voluntary recall of Buckyballs.
- Companies and individuals cannot sell, manufacture, distribute, or import Buckyballs in any marketplace, including online services such as eBay or Craigslist.
- The Buckyballs recall will be publicized appropriately.
- Consumers will receive refunds as outlined in the settlement for the recalled Buckyballs.
- A website will be set up to further publicize the Buckyballs recall.

The costs of the publicity, refunds and website will be borne by the Defendants. Because the settlement accomplishes what we sought in the Complaint, I accepted the settlement.
I congratulate the parties on reaching this resolution. I hope, as a result, families who own Buckyballs will return the dangerous product as per the directions in the settlement and all companies and individuals will stop sale of Buckyballs in this country. I also hope that the publicity of this settlement and the accompanying Buckyballs recall and stop sale will lead to a significant decrease in injuries, incidents and deaths related to this product.

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

COMMISSIONER ANN MARIE M. BUERKLE

May 14, 2014

Commissioner Buerkle's Statement on the Zucker Settlement Agreement

I voted to approve the proposed settlement, but there is an aspect of this case that I find troubling. The consent agreement before us names as a Respondent one Craig Zucker, a former Chief Executive Officer of Maxfield and Oberton Holdings, LLC (hereinafter "Maxfield"). Upon review of the public record, however, it appears that, the Commission never approved the issuance of a complaint against Mr. Zucker. I believe the case against Mr. Zucker should never have gotten started without an affirmative Commission vote approving the issuance of a complaint against him.

Under CPSC rules, "any adjudicative proceedings . . . shall be commenced by the issuance of a complaint *authorized by the Commission* . . .." 16 C.F.R. §1025.11(a) (emphasis added). The rules prescribe the form and content of such a complaint. Of primary significance here, it must include "Identification of *each respondent* or class of respondents." *Id*. § 1025.11(b)(2)(emphasis added). Other requirements include a "clear and concise *statement of the charges*, sufficient to inform each respondent with reasonable definiteness of the factual basis or bases of the allegations of violation or hazard." *Id*. § 1025.11(b)(3)(emphasis added).

The rules permit the Presiding Officer in an adjudicative proceeding to approve an amended complaint, but only if the amendment "do[es] not unduly broaden the issues in the proceedings or cause undue delay." *Id.* § 1025.13. Plainly, this provision was never intended to allow an expansion of the case beyond what the Commission has authorized. Naming a new respondent or leveling a new charge would fall outside the scope of the original complaint approved by the Commission. To allow such an amendment without Commission approval would usurp the prerogative of the Commission under § 1025.11(a).

This reading of the rule was emphasized in the preamble that accompanied it. Commenters on the proposed rule had expressed concern that allowing the Presiding Officer to permit certain amendments could "alter the charges originally authorized by the Commission, thereby usurping the Commission's function . . .." Rules of Practice for Adjudicative Proceedings, 45 Fed. Reg. 29206, 29207 (col. 3) (May 1, 1980). In response, the Commission observed: "[S]ince § 1025.11(a) provides that only a complaint authorized by the Commission may be issued,

amendments to the complaint must come within the scope of the Commission's authorization. Thus, neither the presiding officer nor the Commission's staff is usurping the Commission's function." *Id.* at 29208 (col. 1).

The case before us started out as a case against Maxfield only. It began with a complaint filed in July 2012. That complaint was duly authorized by a majority vote of the Commission, and it states explicitly that it was "ISSUED BY ORDER OF THE COMMISSION." See Complaint at 12 (July 25, 2012). Maxfield was the one and only Respondent named in the July 25 complaint; it does not mention Mr. Zucker.

In September 2012, Complaint Counsel filed a motion for leave to file an amended complaint. Counsel sought to add a count, based on a new theory, namely failure to comply with an applicable consumer product safety rule. Again the complaint states that it was "ISSUED BY ORDER OF THE COMMISSION." Amended Complaint at 19 (Sept. 18, 2012). In reality, however, the Commission had not voted to approve the additional count.

Maxfield never responded to Complaint Counsel's motion seeking leave to file the amended complaint. On November 16, 2012, the Presiding Officer granted the unopposed motion, and the Amended Complaint was docketed. A few weeks later, Maxfield filed a Certificate of Dissolution.

In February 2013, Complaint Counsel responded to this unexpected development by moving to file a Second Amended Complaint, which named Mr. Zucker as a new Respondent in his capacity as CEO of Maxfield and Oberton and as an individual. The lodged Complaint again states that it was "ISSUED BY ORDER OF THE COMMISSION." Second Amended Complaint at 21 (Feb. 11, 2103). This representation, however, was untrue. In reality, the Commission has never authorized any amendment since the original complaint.

Mr. Zucker vehemently opposed the Second Amended Complaint, without conceding jurisdiction, on various grounds. He argued that Section 15 of the Consumer Product Safety Act does not permit the Commission to order a recall to be conducted by an individual officer or director of a corporation that manufactures consumer products. Opposition to Motion for Leave to Amend Complaint in CPSC Docket 12-1, at 2 (Feb. 28, 2103). More generally, he stated that "bedrock principles of corporate law make clear that corporate officers such as Mr. Zucker are not liable for the company's obligations, even if the company has dissolved." *Id.*

The Presiding Officer disagreed with Mr. Zucker's analysis and issued an opinion ruling that Mr. Zucker "may properly be included as a respondent in the instant proceeding." Order Granting Complaint Counsel's Motion for Leave to File Second Amended Complaint in Docket Nos. 12-1 and 12-2, at 17 (May 3, 2013). Thereafter, the Presiding Officer also denied Zucker's motion for an interlocutory appeal on the issue.

The question raised by Mr. Zucker-- when, if ever, an individual officer or director of a corporation can properly be made a Respondent in a contested recall case—is one of enormous consequence for consumers and manufacturers alike. The proposed settlement agreement before us leaves the question open, and hence presents no occasion for us to address it. Our rules of practice reserve the decision as to whom should be made a respondent in adjudicative proceedings for the Commission alone, and this important policy question should never have been injected into the litigation without our prior approval. If Complaint Counsel can alter our fundamental policy judgments about whom to sue and why, by amending the complaint, then § 1025.11(a) is virtually meaningless.[1]

Despite my concerns about how this case unfolded, I do not think it necessary to vote against the proposed settlement. Mr. Zucker has conceded our jurisdiction over him, "for purposes of settlement only." Consent Agreement at 4. On review of the settlement, I see no basis for unraveling the parties' negotiated agreement.

After my colleagues have had an opportunity to reflect on the issue I am raising, I hope we can remove any lingering ambiguity on this important matter. If they do not agree that the current rule forbids adding new counts or new respondents in an adjudication without our approval, then I propose that we modify the rule as necessary to make our primacy in this regard unambiguous. However we proceed, we also must ensure that no CPSC document indicates it has been "issued by order of the Commission" unless that is true.

[1] A vexing aspect of this issue is that it is not easy for the Commission to reclaim its prerogative in the matter once it is lost. This case illustrates the point. Complaint Counsel filed an amended complaint which added a respondent. The Presiding Officer allowed the amendment and disallowed an interlocutory appeal. At that point, the only way for the issue to come before the Commission would be if the case were litigated all the way to an Initial Decision.